COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-697

ELSA VILLANUEVA

vs.

COMMERCE INSURANCE COMPANY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this action for the defendant's alleged violations of G. L. c. 176D and G. L. c. 93A, the plaintiff, Elsa Villanueva, argues that the trial judge erred when he allowed the defendant's motion for involuntary dismissal pursuant to Mass.R.Civ.P. 41(b)(2), 365 Mass. 803 (1974). We affirm.

Background. a. The accident. The plaintiff was seriously injured when she was struck by a car owned and operated by Valerie Troiano, an insured of the defendant, Commerce Insurance Company (insurer). Upon review of the accident, the insurer determined that the plaintiff was more than fifty percent negligent in the occurrence as she had stepped out from between two parked cars, into the traffic lane, on a dark morning, in the rain, wearing dark clothing, and she was not in a crosswalk

when the accident occurred. The insurer also set the damages reserve at the limit of the policy.

There was one witness to the accident, Manuel Martinez, a cab driver who was waiting for the plaintiff while she dropped off her daughter at day care. Martinez told the insurer's investigator that Troiano was driving too fast and left the scene of the accident.[1] Immediately following the accident, Martinez stated that he could not identify the gender of the driver because, "[i]t's at night . . . It's still dark." Troiano was not cited civilly or criminally for the accident. She testified that she did not see what she had hit because it was dark and rainy so she went around the block to return to the scene of the accident. The plaintiff had no memory of the accident. The plaintiff sought the limit of the policy, but only if the matter settled before she filed suit. The insurer offered $5,000, the estimate of the legal fees, to settle the claim.

b. The underlying tort claim and jury trial. The plaintiff sued Troiano seeking damages for her injuries. Prior to trial, the insurer tried several times to obtain a statement from Martinez and to depose him, but he did not appear until just before the scheduled date for the trial of the underlying tort claim. In addition, there was some correspondence from the

[1] Martinez's statements were inconsistent over time.

insurer's investigator to the insurer that suggested that Martinez was a friend of the plaintiff and that his version of events was favorable to the plaintiff for that reason.

Within four months of trial, three events of import occurred. The insurer received a medical report that the plaintiff had a permanent impairment resulting from the accident, the plaintiff rejected high-low arbitration,[2] and Martinez appeared for a deposition. At that time, the insurer offered the policy limit of $100,000, but the plaintiff rejected the offer. At trial, the jury awarded $414,500 to the plaintiff. The jury determined that the plaintiff's comparative negligence was thirty-five percent in the accident. After the jury's verdict, but before posttrial motions were heard, the insurer paid the full policy limit of $100,000.

c. The present action. After trial, the parties exchanged letters pursuant to G. L. c. 176D and G. L. c. 93A. The plaintiff then commenced the present action in the Superior Court against the insurer, claiming unfair claims settlement practices in violation of G. L. c. 176D and G. L. c. 93A.

Following the plaintiff's presentation of her case in a nonjury trial, the defendant moved for dismissal pursuant to rule 41(b)(2). The judge allowed the motion on the grounds that

[2] The insurer offered arbitration whereby the plaintiff could receive no less than $5,000, but also could not receive more than $100,000.

the plaintiff did not present any expert testimony that the insurer breached its statutory duty, and because, on the facts and the law as presented at trial, a reasonable fact finder could not find that the insurer had breached its statutory duty. The plaintiff appealed the decision to this court.

Discussion. The plaintiff contends that as soon as the insurer learned that Martinez faulted Troiano for the accident, liability was reasonably clear, the insurer was thus required to make a reasonable settlement offer, and the insurer's $5,000 offer was unreasonable. The plaintiff further argues that the insurer's subsequent pretrial offer of the $100,000 policy limit demonstrated that the insurer knew that liability exceeded the policy limits and that the insurer's prior offer of $5,000 was unreasonable.

a. Legal standards. "The general rule in this Commonwealth is that an insurer is held to a standard of reasonable conduct in its defense of its insured." Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 118 (1994). Under G. L. c. 176D, an insurer is required "to effectuate [a] prompt, fair and equitable settlement[] of claims in which liability has become reasonably clear." Bobick v. United States Fid. & Guar. Ins. Co., 439 Mass. 652, 658-659 (2003), quoting from G. L. c. 176D, § 3(9)(f). The phrase "'reasonably clear' calls for an objective standard of inquiry

into the facts and the applicable law." Demeo v. State Farm Mut. Auto. Ins. Co., 38 Mass. App. Ct. 955, 956 (1995). See Bobick, supra at 659 (insurer is "not required to put a fair and reasonable offer on the table until liability and damages [are] apparent"); O'Leary-Alison v. Metropolitan Prop. & Cas. Ins. Co., 52 Mass. App. Ct. 214, 217 (2001) (same). In determining whether an insurer is liable for failing to settle the underlying action within the coverage limits of its policy, the test is "whether no reasonable insurer would have failed to settle the case within the policy limits." Hartford Cas. Ins. Co., supra at 121.

Here the judge decided the case under rule 41(b)(2), which provides, in relevant part: "[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Our review, "as in any case where the judgment is based on findings of fact under [Mass.R.Civ.P. 52(a), as amended, 423 Mass. 1402 (1996)], is under the clearly erroneous standard. See Smith & Zobel, Rules Practice § 41.10 (1977)." Mattoon v. Pittsfield, 56 Mass. App. Ct. 124, 139 (2002). "[I]n passing upon a motion under the second sentence of rule 41(b)(2) a trial judge is not

limited to that standard of proof required for a directed verdict . . . rather, the judge is free to weigh the evidence and resolve all questions of credibility, ambiguity, and contradiction in reaching a decision." Ibid., quoting from Ryan, Elliott & Co. v. Leggat, McCall & Werner, Inc., 8 Mass. App. Ct. 686, 689 (1979).

b. The judge's findings. The judge gave the following grounds for granting the rule 41(b) motion:

> "First, . . . lack of any expert testimony establishing the [insurer]'s breach concerning its statutory duty in settling claims. . . . The claimed violation is not so egregious that an expert would not be necessary. Secondly, . . . on the mix of facts presented, especially the evidence of the sole claimed independent witness to the accident, and the vagueness of the plaintiff's own description of the occurrence, that as a matter of law, a reasonable fact finder could not find that the defendant insurer had breached its duty to the plaintiff. Among the facts which the Court considers on this point is that the insurer's view that comparative negligence of the plaintiff was at least 51%, was not unreasonable as, inter alia, the jury ruling on her tort claim ultimately assessed her own negligence at 35%."

In addition, at the close of the hearing on the insurer's motion, the judge made, inter alia, the following findings: "[T]he Court finds that the sole eyewitness to this case had, over the course of time, made himself scarce. . . . [The insurer] was not required to take the snippet [of Martinez's statement] that it was able to get on the fly by its investigator from Mr. Martinez and to say, Ah, based on that, a

$100,000 policy is handed over. In the circumstances[,] I think they were not unreasonable." The judge, relying on the Supreme Judicial Court's guidance in Bobick, supra, also considered

> "what the jury ultimately did in terms of whether or not the insurance carrier was reasonable. . . . [E]ssentially the carrier was taking the position that [the plaintiff] was at least 51% [negligent], the jury ultimately reached the conclusion of 35% [negligent] and the disparity is only 16% in those circumstances. That's a factor that the Court can consider on this issue. The Court simply finds, based on what [it has] heard, that the lack of an expert where there was a mixed picture here presented is a circumstance in which a required finding is appropriate."[3]

c. Breach of statutory duty. The plaintiff asserts that the facts developed at trial established that Troiano's liability was reasonably clear from the time that the insurer's investigator interviewed Martinez, and learned that Troiano was allegedly speeding and did not stop after hitting the plaintiff. She also argues that the jury award of $414,500 established that the insurer's liability was reasonably clear, and that the insurer's refusal to settle for the policy limit was unreasonable. Finally, she claims that the setting of the reserve at $100,000 tended to prove that the initial $5,000 settlement offer was not fair or reasonable.

Contrary to the plaintiff's claim, the insurer at all times believed that the plaintiff's liability was greater than fifty percent, and thus reasonably believed that Troiano would succeed

[3] On appeal, the plaintiff does not challenge the sufficiency of the judge's findings.

on the merits of the underlying tort claim. The facts and evidence supporting this reasonable belief include the following: the insurer estimated the plaintiff's negligence at more than fifty percent because she had entered into the traffic lane, outside of a crosswalk, on a dark, rainy morning, from between two parked cars, wearing dark clothing;[4] Martinez made himself "scarce" after his initial statement to the insurer's investigator; and Martinez failed to appear for two scheduled meetings and failed to appear for multiple scheduled depositions, leaving doubt as to his appearance at trial.[5] Furthermore, Troiano was not cited for any civil or criminal motor vehicle infraction. In light of these facts and the jury finding that the plaintiff was thirty-five percent negligent in the accident, the judge properly allowed the motion for involuntary dismissal. See Bobick, supra at 655-662 (summary judgment properly allowed where extent of insurer's liability could not, as matter of law, have been clear, as evidenced by jury's verdict which apportioned eighty percent liability among three defendants and twenty percent liability to plaintiff).

[4] The parties stipulated that the plaintiff entered the street from between two parked vehicles. The rainy, dark conditions, and that the plaintiff did not enter the street via a crosswalk, were likewise not disputed at trial.

[5] In addition to failing to provide a complete statement to the insurer and repeatedly failing to appear for his scheduled deposition, the trial record reflects inconsistencies between Martinez's initial report to the police and subsequent statements and deposition testimony.

Furthermore, the plaintiff makes much of the fact that the insurer's reserve was set at the $100,000 limit of the policy for the plaintiff's claim against Troiano. A claims settlement specialist for the insurer testified that the reserve represents how much of the policy limits the insurer sets aside to cover the "worst-case" scenario. The reserve does not represent any liability assessment, but is based on a damages assessment only. The reserve has no bearing on whether the insured is liable for the accident. The plaintiff cites no legal authority to the contrary. Contrast Bohn v. Vermont Mut. Ins. Co., 922 F. Supp. 2d 138, 147 (D. Mass. 2013) ("The fact that defendant raised its reserve for plaintiff's claim following both of its 'roundtable' meetings, in October, 2006 and June, 2008, suggests that the insurer reasonably recognized that its liability had become more likely but it does not mean that liability had become 'reasonably clear' as to both fault and damages" [emphasis supplied]).

Finally, the amount of the jury verdict in the underlying tort claim, under the facts of this case and in view of the plaintiff's contributory negligence, does not compel a finding that the insurer acted unreasonably. See Bobick, supra at 662 ("To be sure, a jury's verdict is not always predictable and may not constitute in all circumstances a definitive measure of reasonableness"). The judge was entitled to "weigh the evidence

and resolve all questions of credibility, ambiguity, and contradiction in reaching a decision," and we cannot say, on this record, that his findings were clearly erroneous. Mattoon, 56 Mass. App. Ct. at 139.[6]

d. Expert testimony. The plaintiff also asserts that the judge erred in finding that expert testimony was required to establish that the insurer breached its statutory duty in settling claims. We disagree.

"The test for determining whether a particular matter is a proper one for expert testimony is whether the testimony will assist [fact finders] in understanding issues of fact beyond their common experience." Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 402 (2003). The standard of care applicable to an insurer has been held to be "analogous to the standard of care owed by other professionals to their clients

[6] We are unpersuaded by the plaintiff's claim that the insurer's decision to increase the settlement offer to $100,000, prior to the underlying tort claim trial, proved that liability had become reasonably clear and that the initial settlement offer was unreasonable. On the contrary, as the underlying case neared trial, the insurer received a medical report that the plaintiff had a permanent impairment resulting from the accident; the plaintiff rejected high-low arbitration; and Martinez finally appeared for a deposition. These factors increased the insurer's exposure and overall risk, justifying an increased settlement offer. However, the percentage of damages attributable to Troiano remained in dispute and was not reasonably clear. See Bobick, supra at 660 (despite insurer's assessment report that acknowledged that insured was also liable, "the percentage of damages attributable to [insurer] was still the subject of good faith disagreement").

and is elucidated by expert testimony. See Fishman v. Brooks, 396 Mass. 643, 647 (1986) (expert testimony usually required to establish attorney negligence). . . . Only where professional negligence is so gross or obvious that [fact finders] can rely on their common knowledge to recognize or infer negligence may the case be made without expert testimony." Id. at 403

Cognizant of these standards, the judge here specifically found that expert testimony was needed in the present case because there was no "testimony establishing the [insurer]'s breach concerning its statutory duty in settling claims. . . . The claimed violation is not so egregious that an expert would not be necessary." Thus, although expert testimony may not be required in every case asserting a breach of the duty to settle claims under G. L. c. 176D, in view of the defendant's inability to demonstrate that liability for the underlying accident was reasonably clear, it was needed in the present case.[7] Expert testimony in the present case could have been helpful, because the jury in the underlying tort case had divided liability between Troiano and the plaintiff. See Bobick, supra at 660 (extent of insurer's liability to plaintiff could not have been

[7] Even assuming error in the judge's ruling regarding the absence of expert testimony, the allowance of the rule 41(b)(2) motion was proper given the judge's finding that there was no breach of duty.

clear, as matter of law, as evidenced by jury verdict which divided liability among defendants and plaintiff).

Lastly, the plaintiff argues that a letter from the insurer's investigator, alluding to a possible preexisting relationship between the plaintiff and Martinez, constituted further evidence of the insurer's unfair claims settlement practices. We agree with the judge that "the fact that there may have been a statement in there that was a misstatement doesn't bump this up to being a gross negligence circumstance by virtue of their failure to have settled this case." See Utica Mutual, supra at 403. Where, as here, the evidence supports the judge's findings and because the judge can weigh the evidence and determine credibility, his findings were not clearly

erroneous. Mattoon, 56 Mass. App. Ct. at 139.[8]

Judgment affirmed.

By the Court (Cypher, Wolohojian & Neyman, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: May 18, 2016.

[8] The plaintiff also contends that the judge erred by failing to draw all reasonable inferences in favor of the plaintiff. This argument ignores settled precedent, stated supra, that under rule 41(b)(2) a judge is free to weigh evidence and resolve all questions of credibility, ambiguity, and contradiction in reaching a decision. See Mattoon, supra. See also Smith & Zobel, Rules Practice § 41.11, at 45 (2d ed. 2007) ("evidence which would have precluded a directed jury verdict does not prevent a [r]ule 41(b) dismissal after the plaintiff's evidence").

[9] The panelists are listed in order of seniority.